

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

JOWELL C. BULLARD, NORRIS RAY §  
TOLLERSON, JR., RANDY STOKES, JR., §  
DONNA DAVIS, ROBERT F. DEXTER, JR., §  
JOSHUA R. LUSTER, SCOTT RUSK, §  
JEFFORY E. POOL, TYE A. WARD, JAMES §  
DAVID SMITH, MICHAEL A. KING, §  
DOMINGO MARQUEZ, STEPHEN A. §  
WILSON, H. WAYNE BLACK, CHARLES §  
DOUGLAS WALKER, GARY D. PHENIX §  
SCOTT BEECHER HERRING, PAM J. HITT, §  
SAMUEL RAY GIBSON, EUFEMIO JOE §  
RUBALCABA, CHRISTOPHER L. §  
SCHWARZ, STACY L. GRANT, HERBERT §  
CHARLES CARR, CHRIS JENKINS, TODD §  
FINLEY, KEVIN WAYNE OSBORNE, M.L. §  
WITHERSPOON, ALVIN VIRGIL NEWTON, §  
RODERICK J. UPTON, and KEVIN §  
LANKFORD, §

Plaintiffs, §

v. §

BABCOCK & WILCOX TECHNICAL §  
SERVICES PANTEX, LLC, §

Defendant. §

CIVIL ACTION NO. 2-07CV-049-J

**MOTION TO STRIKE PORTIONS OF PLAINTIFFS' REPLY TO DEFENDANT'S  
RESPONSE OR ALTERNATIVELY, MOTION FOR LEAVE TO FILE SUR-REPLY**

TO THE HONORABLE UNITED STATES DISTRICT COURT:

COMES NOW BABCOCK & WILCOX TECHNICAL SERVICES PANTEX, LLC  
("Defendant"), and files this Motion to Strike Portions of Plaintiffs' [Reply] to Defendant's  
Response or Alternatively, Motion for Leave to File Sur-reply ("Motion"), and as grounds in  
support of this Motion would show the Court as follows:

## **INTRODUCTION**

1. Plaintiffs filed a Motion for Fees and Costs in this case which included a request for \$41,936.34 in expenses, \$495,771.75 in attorney fees, and requested one-third upward adjustment of the lodestar in the amount of \$163,604.68. Defendant filed a Response to this Motion on September 24, 2009, and Plaintiffs filed a Reply on October 8, 2009. The Reply contained new arguments and new evidence as explained below. Defendant has had no opportunity to respond to these new arguments and this new evidence. Accordingly, Defendant files the Motion to Strike Portions of Plaintiffs' Reply to Defendant's Response or Alternatively, Motion for Leave to File Sur-Reply.

## **ARGUMENT AND AUTHORITIES**

2. Plaintiffs' Reply attempts to raise arguments for the first time and attach new evidence that should have been attached to their original Motion. Plaintiffs' Reply contains two particularly significant examples of new arguments and evidence: (1) an argument that the Court should follow an overruled concurring opinion from 1987 and upwardly adjust the lodestar because Plaintiffs' attorneys were hired on a contingent fee and (2) a new argument and new evidence that plaintiffs' attorneys have higher hourly rates than defense attorneys with fee-paying clients supported by affidavits from Philip R. Russ, Mike Warner, and Jason Webster. Furthermore, the only affidavit evidence from a disinterested attorney (Mr. Russ) should have been submitted as part of Plaintiffs' original Motion for Fees and Costs.

3. In these two (2) examples, Plaintiffs improperly raise new arguments and provide new evidence in the final round of pleading.

4. Plaintiffs' inclusion of these new arguments and new affidavits as supporting evidence are improper. A reply brief's purpose is to rebut the response of the nonmovant; it should not contain new supporting materials.

5. Defendant does not have an opportunity to respond to these new arguments and the new evidence without leave of the Court and therefore requests that the Court strike these portions of Plaintiffs' Reply.

6. Alternatively, if these portions of Plaintiffs' Reply are not stricken, Defendant respectfully requests leave of the Court to respond to arguments and evidence raised for the first time in the Reply by filing a short sur-reply brief of no more than 10 pages.

#### **PRAYER**

Defendant respectfully requests that the Court strike Plaintiffs' claim that they are entitled to an upward adjustment of the lodestar since this case was taken on a contingent fee. Defendant also respectfully requests that the Court strike the affidavits of Philip R. Russ, Michael A. Warner, and Jason C. Webster attached to Plaintiffs' Reply. Alternatively, Defendant requests leave of Court to file a sur-reply to these new arguments and new evidence. Defendant respectfully requests that it be given five (5) days from the date the Court grants leave to file the sur-reply and agrees to limit the sur-reply to a maximum of ten (10) pages, not including exhibits including affidavits that may be attached to the sur-reply.

Respectfully submitted,

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By: /s/ Bradley W. Howard  
Bradley W. Howard

**ATTORNEYS FOR DEFENDANT**

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**CERTIFICATE OF CONFERENCE**

I hereby certify that our firm has conferred with Michael A. Warner and Jason C. Webster, Plaintiffs' counsel, regarding Defendant's Motion to Strike Portions of Plaintiffs' Reply to Defendant's Response or Alternatively, Motion for Leave to File Sur-Reply, and they oppose the relief sought in this motion.

/s/ Bradley W. Howard  
Bradley W. Howard

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document and that a true and correct copy was served on the parties listed below through the electronic case filing system if the Notice of Electronic Filing indicated that the parties received it or otherwise by mailing a copy by Certified Mail, Return Receipt Requested, to the parties this 9th day of October, 2009.

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/s/ Bradley W. Howard  
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Bradley W. Howard